



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 15, 1993

Mr. Humberto Silva
Attorney at Law
222 West University
Edinburg, Texas 78539

OR93-748

Dear Mr. Silva:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code.¹ Your request was assigned ID# 17402.

The Edcouch Elsa Independent School District (the "school district"), which you represent, has received a request from an attorney representing a former school district employee for various documents as well as the former employee's complete personnel file. You state that the school district objects to the release of two internal memoranda contained in the employee's personnel file. You claim the memoranda are excepted from required public disclosure under sections 552.101, 552.102 and 552.111 of the Government Code.

Section 552.111 excepts "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In an opinion that reexamined the section 552.111 exception, this office concluded that section 552.111 excepts from public disclosure:

¹We note that the Seventy-Third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body at issue. [It] does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda.

Open Records Decision No. 615 (1993) at 5 (copy enclosed). Furthermore, in order for information to come within the section 552.111 exception, the information must be related to the policymaking functions of the governmental body. *Id.* "An agency's policymaking functions do not encompass routine internal administrative and personnel matters" *Id.* All of the documents you claim are excepted under section 552.111 relate to personnel problems, not to the "policymaking functions" of the school district. You may not, therefore, withhold any of the requested documents under section 552.111 of the Government Code.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." In order for information to be protected from public disclosure under the common-law right of privacy as incorporated by section 552.101 (former section 3(a)(1) of article 6252-17a, V.T.C.S.), the information must meet the criteria set out in *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that:

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former section 3(a)(1) of article 6252-17a, V.T.C.S.). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation of the South* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. Section 552.102 excepts:

(a) . . . information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter.

(b) . . . a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

Section 552.102 protects personnel file information only if its release would cause an invasion of privacy under the test articulated for common-law privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.) (court ruled that test to be applied in decision under former section 3(a)(2), V.T.C.S. article 6252-17a, was the same as that delineated in *Industrial Foundation of the South* for former section 3(a)(1), V.T.C.S. article 6252-17a). Accordingly, we will consider the arguments for withholding information from required public disclosure under section 552.101 and section 552.102 together.

The two memoranda in question concern allegations of sexual harassment. This office previously concluded that the common-law privacy aspects of sections 552.101 and 552.102 did not apply to witness names and statements regarding allegations of sexual misconduct. Open Records Decision No. 579 (1990). Subsequently, the court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), held that "names of witnesses required to give information under threat of discipline, their statements regarding highly embarrassing, offensive and unprofessional conduct in the workplace, their dating and sexual relationships, the state of marriages and other highly personal material" are protected from disclosure under the privacy exceptions as described by the *Industrial Foundation of the South* court, 840 S.W.2d at 524-25. The affidavit of the person under investigation and the conclusions of the board of inquiry were, however, ordered released to satisfy the legitimate public interest. *Id.* The memoranda in question, although potentially embarrassing to a reasonable person, are of legitimate concern to the public. Because there appear to be no other documents concerning the allegations, the memoranda must be released to satisfy the public interest. However, the public interest does not necessitate knowing the names of the employees involved. Accordingly, you must delete the names of the employees who were questioned in response to the allegations. For your convenience, we have marked those portions of the documents that must be withheld under common-law privacy.²

²We note that some of the information that would be protected under section 552.101 and 552.102 relates to the requestor. Section 552.023 of the Government Code provides a special right of access to information that is being withheld under common-law privacy where the information is being requested by the person whose privacy is at issue. We have marked in blue those portions of the documents that must be released to the requestor under section 552.023 of the Government Code.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,

A handwritten signature in black ink that reads "Susan L. Garrison". The signature is written in a cursive style with a large, looped "S" and a distinct "L" and "G".

Susan L. Garrison
Assistant Attorney General
Open Government Section

SLG/LBC/rho

Ref.: ID# 17402

Enclosures: Marked documents